TITLE EXAMINATION STANDARDS IN AMERICA
AND
IN OKLAHOMA

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TABLE OF CONTENTS

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SELECTED PUBLICATIONS:

"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (December 10, 2011);
"Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after Rocket Oil and Gas Co. v. Donabar", 82 The Oklahoma Bar Journal 622 (March 12, 2011);
"Well Site Safety Zone Act: New Life for Act", 80 OBJ 1061 (May 9. 2009).

I. INTRODUCTION

In the 1950's and 1960's different efforts were initiated to facilitate real estate transactions. In particular there was a desire to reduce the cost and time expended on curing minor or ancient title defects.

Three efforts arose including:

1. Title insurance,
2. Title curative acts, and
3. Title examination standards.

I will only discuss title examination standards in this article.

II. GENERAL DISCUSSION

What are title examination standards? Simes and Taylor in their 1960 Model Title Standards suggested:

> *A uniform title standard may be described as a statement officially approved by an organization of lawyers, which declares the answer to a question or the solution for a problem involved in the process of title examination.*

The commentators whose works are quoted frequently herein include the following:

1. Lewis M. Simes and Clarence B. Taylor, Model Title Standards, the University of Michigan Law School, Ann Arbor, Michigan (1960) (herein "Model Title Standards");
2. John C. Payne, "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev. 1 (1953) (herein "Increasing Marketability");
3. John C. Payne, "The Why, What, and How of Uniform Title Standards", 7 Ala.L.Rev. 25 (1954) (herein "The Why of Standards");

4. Harlan B. Strong, "Title Standards Come of Age", 30 Fla. Bar J. 371 (1956) (herein "Standards Come of Age");
5. Rufford G. Patton and Carroll G. Patton, Patton on Titles, 2nd Edition (herein "Patton");
6. Richard R. Powell, The Law of Real Property (herein "Powell"); and
7. Paul E. Bayse, Clearing Land Titles (herein "Bayse").

The problems arising from a search for perfect title impact the examiner and their clients in several negative ways:

1. The legal fees charged to the public are higher because each examination for a parcel must always go back all the way to sovereignty (or, in some states, back to the root of title);
2. The costs to cure minor defects are often relatively large compared to the risk being extinguished;
3. The unexpected costs to remedy problems already existing when the vendor came into title, which were waived by the vendor's attorney, are certainly not welcomed by the public; and
4. The prior examiner looks inept and/or the subsequent examiner looks unreasonable, when a preexisting defect is waived by one attorney and "caught" by the next.

("The Why of Standards")

Once the problems arising from the lack of a uniform approach to determining marketable title became unbearable, efforts sprang up across the country first locally and then on a statewide

basis.

The various efforts to adopt standards took slightly different directions because these efforts were made initially in isolation and because the needs of local bars were often different than those of state bars. However, several commentators, who have studied the resulting work products, have identified certain areas of commonality.

In regard to the need to integrate state and local efforts, it has been said:

> *As we have seen, the standards may cover an almost indefinite number of problems. They have been created locally, in many cases without any reference to action elsewhere, and in part as a consequence of variations in legal doctrine prevailing in different jurisdictions. Moreover, the intelligence and enthusiasm of their proponents has varied greatly from place to place. As a consequence the standards show great disparity as to both quantity and quality. In one state they may take the form of a considerable body of well-integrated and carefully drafted rules of practice, while in a sister jurisdiction they may deal with entirely different subject matter and may be few in number and poorly drafted. Despite these differences, they may be classified generally under several headings. The most important distinction which should be made is that between statewide and local title standards. I have previously pointed out that in addition to the adoptions made by state bars, we find a body of standards put into force by city or county associations. Where there has been no statewide action, such local efforts are salutary and desirable; and the form of the local adoptions should be the same as that at the state level. It is argued that where the state bar association has taken the initiative, local action can only cause confusion and should not be permitted. The theory behind this contention is that legal norms are uniform throughout the jurisdiction and that a title good in one part of the state should be good elsewhere. Local action should not be allowed to vary rules designed to obtain statewide consistency of practice. This contention is undoubtedly correct when applied to the local standards which have been put into force up until now. In almost every case the local adoptions have substantially the same kind of content as the state standards -- that is to say, they have been expressed in terms of legal norms. These norms may be the same as those expressed in the state standards or may be in contradiction to them. In the former case the local standards have no utility and in the latter they are positively harmful. It seems to have been overlooked that the problems faced at the state and at the city or county level are essentially different. The state bar can only lay down general rules of practice. The local bar, on the other hand, is concerned with the effect of a specific set of public records.* ("The Why of Standards")

The drafters of standards must decide the threshold question as to whether to cover topics on

which there is little or substantial controversy or stick to the middle area. Simes and Taylor, in the introduction to the 1960 Model Title Standards, suggested as follows:

> *Should the question involved in a title standard be a controversial one, or should it be a question the answer to which would be agreed upon by all members of the bar? If on the one hand, the question is extremely controversial, there is danger that the standard will not be followed by those who disagree with it. On the other hand, if there is no possible question about the standard, it may be said that there is no point in declaring it, since the conveyancing practice which it expresses will be followed anyway. Thus, there is no particular point in having a standard which declares that a recorded deed is presumed to have been delivered, since every lawyer will apply that presumption anyway.*
>
> *It would seem that a standard should represent the substantially unanimous opinion of the members of the bar who are experienced conveyancers, but it should involve a question upon which inexperienced conveyancers may be uninformed, or with respect to which overmeticulous conveyancers may take a position opposed to that of practically all competent, experienced conveyancers. In other words, it should not be a question which is controversial among competent, experienced conveyancers, but it should be one upon which the inexperienced may go wrong or the "fly specker" may reach an unreasonable conclusion. To find these problems, it may be suggested that there should be an organized conveyancing section of the state bar, and that a committee of this section should secure opinions on the appropriate matters for title standards from lawyers representing all geographical areas of the state.*

Payne has identified four areas where uniform title examination standards are typically useful, which are as follows:

1. The presumptions of facts which will support the record, such as:
    a. Identically named people are the same people,
    b. There's no forgery,
    c. The granting parties are competent, and
    d. The documents were delivered;
2. The legal rules applicable to the facts to be presumed;
3. The period of search necessary to establish a good title; and

4. The effect of the statute of limitations upon substantial defects appearing in the record under examination.

("Increasing Marketability")

Bayse came up with a slightly different list of general areas that can be successfully addressed by uniform standards. He suggested:

> *Title standards have encompassed several different areas. These include (1) attitudes and relationships between examiners themselves and between examiners and the public; (2) the duration of search; (3) the effect of lapse of time on record title defects; (4) presumptions of fact which should ordinarily be applied by examiners; and (5) the law applicable to commonly recurring situations. Some have specified the form and content of abstracts and their certificates, the form of certificates of title, the effect of wild deeds, and sometimes the effect of legislation itself. Such is particularly true of Marketable Title Acts which have recently appeared on the scene with far-reaching application to titles and their appraisal.* (Bayse: §7. Real Estate Title Standards)

The Model Title Standards developed by Lewis M. Simes and Clarence B. Taylor in 1960 included chapters on these topics:

CHAPTER I. THE ABSTRACT

CHAPTER II. THE TITLE EXAMINER

CHAPTER III. USE OF THE RECORD

CHAPTER IV. MODEL MARKETABLE TITLE ACT

CHAPTER V. NAME VARIANCES

CHAPTER VI. EXECUTION, ACKNOWLEDGMENT, AND RECORDING

CHAPTER VII. DESCRIPTIONS

CHAPTER VIII. THE USE OF AFFIDAVITS AND RECITALS

CHAPTER IX. MARITAL INTERESTS

CHAPTER X. CO-TENANCIES

CHAPTER XI. CONVEYANCES BY AND TO TRUSTEES

CHAPTER XII. CORPORATE CONVEYANCES

CHAPTER XIII. CONVEYANCES INVOLVING PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS

CHAPTER XIV. TITLE THROUGH DECEDENTS' ESTATES

CHAPTER XV. EXECUTION AND ATTACHMENT

CHAPTER XVI. MORTGAGES AND MORTGAGE FORECLOSURES

CHAPTER XVII. MECHANICS' LIENS

CHAPTER XVIII. TAX TITLES

CHAPTER XIX. BANKRUPTCY

CHAPTER XX. FEDERAL TAX LIENS

CHAPTER XXI. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

CHAPTER XXII. MISCELLANEOUS

As noted by Simes and Taylor in their 1960 Model Title Standards:

> *In conclusion, in setting up title standards, the members of the bar should never lose sight of their basic function, which is to declare and establish officially the practice of conveyancers. In spite of its limitations, this so-called practice of conveyancers is probably the most potent element in the process of title examination. For essentially it is nothing less than the recognized practices of the conveyancing bar in determining what risks of fact or of law, actual or theoretical, are to be assumed by the title examiner on behalf of his client in approving a title.*

A list of those states with title examination standards is provided as Exhibit A hereto.

III. ENFORCEABILITY OF STANDARDS

1. General

The commentators who push the adoption of uniform standards for each state are able, once in a while, to step back and ask some challenging questions about their own handiwork. Payne in

"Increasing Marketability" raises this query in 1953:

> *The use of title standards raises two major legal problems: (a) whether such standards will be adopted by the courts as the test for marketability; and (b) whether reliance upon the standards constitutes due care on the part of the examiner. Neither of these questions has yet been answered.*

In retrospect it has become clear that taking the following steps, when developing standards, help address these two questions and simultaneously give the Standards added weight:

a. Formal development, adoption and maintenance by the Bar, with guidance by recognized in-state experts and by reference to other states' experiences, with sufficient and timely input from a wide group of in-state practitioners;

b. Incorporation of the Standards into each land transaction by including an express reference to such Standards in the contract (see below);

c. Incorporation of the Standards into some or all transactions by statutory declaration (see below); and

d. Incorporation of the Standards into some or all transactions by court decision (see below).

2. Incorporation Into the Contract

Payne warns, in "The Why of Standards":

> *One particular matter I should like to bring to your attention. I have pointed out that the standards have never been adopted as legal criteria of marketability by any court. It is not certain that when the question is presented to the courts that they will permit the law to be made, in effect, by the practices of conveyancers. In the past we know that such practices have had strong influence on the judiciary, but we cannot be sure whether they will have decisive force in the future. It is also*

> *apparent that an adverse decision by the courts would have a disastrous effect upon the movement as a whole. This has caused much uncertainty among even the most vigorous proponents of title standards. I will suggest, however, that this difficulty can be avoided if the committee can persuade the bar to include in every land sale contract a provision that the vendor shall proffer a title marketable under the tests created by the standards. As the parties may make whatever agreement they desire as to the nature of the thing to be sold and as the agreement implied by law as to marketability is subordinate to any express agreement made by the parties themselves, such a provision would undoubtedly be declared valid and binding.*

The Oklahoma Standards have addressed this issue through Standard 2.2, adopted in 1946:

> ***2.2 REFERENCE TO TITLE STANDARDS***
>
> *It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: "It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate title examination standards of the Oklahoma Bar Association where applicable."*

The language suggested above has been incorporated into the metropolitan realtors' standard form contracts in Oklahoma City and Tulsa.

3. Statutory Declaration

There are at least two ways to secure Statutory support for the Standards. One is to make a specific set of standards become legislative enactments (as was done in Nebraska) and the other is to simply incorporate them in mass into the statutes by general reference to them as they not only exist now, but as they are changed in the future (as was done in Oklahoma).

While we often seek to hoist the standards onto a level above being simply a voluntary set of guidelines, in order to discourage any backsliding by our fellow examiners, the Nebraska experience of having their Standards approved by the state legislature showed that approach to be

dysfunctional.

As noted in Patton:

> *Repeated reports from Nebraska lawyers have confirmed their conviction that this incorporation of title standards into a legislative act was undesirable. For a statement of this, see Report of Standardization Committee of the Real Estate, Probate, and Trust Section of the Nebraska State Bar Association, 36 Neb.L.Rev. 93 (1956); and Morton Title Standards, 31 Mich.St.Bar J. (No. 5), 7 at 15-17 (1952) where the author, who was former chairman of the Nebraska Committee on Title Standards, express regret concerning the enactment of the title standards into legislation, and mentioned the following disadvantages in doing so: lack of flexibility, the fact that documents and discussions concerning individual title standards cannot be included in the framework of the legislation itself, the fact that standards newly adopted by the Bar have no binding force until enacted by the legislature, and that certain other features, such as the constitutionality of legislation, are not susceptible of statutory treatment.*
>
> *The Nebraska statutes were finally repealed by Laws 1973, L.B. 517.* (Patton: §50. Methods on Making Examinations, Note 29.1)

However, in Oklahoma a statute -- dealing with the marketability of oil and gas titles -- incorporates the State Title Examination Standards as the measure of "marketability" and uses language which allows the State Bar to unilaterally change the standards and then those changes are automatically incorporated into the statute (52 O.S. § 570.10). The statute provides:

> *D. 1. Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.*
>
> *2. a. Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from the end of the month in which such production was*

> *sold until such time as the title to such interest becomes marketable. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.* (emphasis added)

The Oklahoma Supreme Court further endorsed the language of this statute by declaring in Hull, et al v. Sun Refining, 789 P.2d 1272 (Okla. 1990): "Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards."

4. Court Incorporation & Construction

In interpreting the rights and obligations of vendors and vendees in a transaction -- which expressly or impliedly calls for marketable title -- there are several state level court cases giving the nod in varying degrees to numerous states' Standards which the court used to help either condemn or to approve a title.

Here are a few instances:

1. Hughes v. Fairfield Lumber and Supply Company, 123 A.2d 195 (Conn. 1956)

The state bar association drafted a form for a survivorship (i.e., Joint Tenancy) deed and incorporated it into the uniform bar standards; based almost solely on the existence and intent of the form, the court concluded the concept of survivorship was still alive in the state.

2. Siedel v. Snider, 44 N.W.2d 687 (Iowa 1950)

The use of affidavits in lieu of probate administration proceedings is disapproved by the Title Standards of the State Bar Association, except in limited circumstances -- not present in this case -- therefore, title was deemed not marketable.

3. In re Baker's Estate, 78 N.W.2d 863 (Iowa 1956)

The Court said it is of interest to note the Committee on Iowa Title Examination Standards held where two joint tenants entered into a contract for the sale of real estate, a severance was effected; it held: the contract of the two now deceased joint tenants severed their joint tenancy interest.

4. Tesdell v. Hanes, 82 N.W.2d 119 (Iowa 1957)

The Court said: ". . . we are disposed to give serious consideration to these standards." The Standards supported a Marketable Record Title Act that was under attack.

5. B. W. & Leo Harris Co. v. City of Hastings, 59 N.W.2d 813 (Minn. 1953)

The Court found that the county auditor's records are not constructive notice, because that was the position in Standard No. 31 of the Minnesota Standards.

6. Hartley v. Williams, 287 S.W.2d 129 (Mo. 1956)

The Court went along with the state's title standards which declared that Tax Deeds are not valid as a basis of title until the tax deed has been of record for at least 27 years.

In Knowles v. Freeman, 649 P.2d 532 (Okla. 1982), the Oklahoma Supreme Court unanimously held:

> *"While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive."*

In footnote 28 to §50. Methods of Making Examinations, Patton, these supportive cases are

listed:

1. (main text of Patton on Titles): Campagna v. Home Owners' Loan Corp., 300 N.W. 894, 140 Neb. 573 (1941), reversed on rehearing 3 N.W.2d 750, 141 Neb. 429 (1942). See also, recognition by the supreme court of Minnesota: Harris v. City of Hastings, 59 N.W.2d 813 (815 n. 3), 240 Minn. 44, noted in 38 Min.L.Rev. 288. And see Siedel v. Snider, 44 N.W.2d 687, 241 Iowa 1227 (title standard followed).

and,

2. (pocket part of Patton on Titles): See also Riggs v. Snell, 350 P.2d 54, 186 Kan. 355 (1960), rehearing denied 352 P.2d 1056, 186 Kan. 725 (title standard followed and standards said to be "entitled to consideration as being the general consensus of the bar").

Title standards have been cited and followed in several other cases: Morrissey v. Achziger, 364 P.2d 187, 147 Colo. 510 (1961); Hughes v. Fairfield Lbr. & Supply Co., 123 A.2d 195, 143 Conn. 427 (1956); In re Baker's Estate, 78 N.W.2d 863, 247 Iowa 1380, 64 A.L.R.2d 902 (1956); Tesdell v. Hanes, 82 N.W.2d 119, 248 Iowa 742 (1957); Hartley v. Williams, 287 S.W.2d 129 (Mo.App. 1956); Grand Lodge of Ancient Order of United Workmen of North Dakota v. Fischer, 21 N.W.2d 213, 70 S.D. 562, 161 A.L.R. 1466 (1945).

Riggs v. Snell, 350 P.2d 54, 186 Kan. 355 (1960), rehearing denied 253 P.2d 1056, 186 Kan. 725.

Chicago & North Western Ry. Co. v. City of Osage, 176 N.W.2d 788 (Iowa 1970), citing Patton on Titles; Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975), certiorari denied 96 S.Ct. 50, 423 U.S. 830, 46 L.Ed.2d 48, citing Patton on Titles.

Also, in footnotes 30 and 31 under §7. Real Estate Title Standards of Bayse, these cases are cited supporting the use of uniform standards:

Morrissey v. Achziger, 147 Colo. 510, 364 P.2d 187 (1961); Hughes v. Fairfield Lbr. & Supply Co., 143 Conn. 427, 123 A.2d 195 (1956); Siedel v. Snider, 241 Iowa 1227, 44 N.W.2d 687 (1950) (following Iowa Title Standard 9.18); In re Baker's Estate, 247 Iowa 1380, 78 N.W.2d 863, 64 A.L.R.2d 902 (1956); Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957), citing Bayse, Clearing Land Titles; Riggs v. Snell, 186 Kan. 355, 350 P.2d 54 (1960), rehearing denied 186 Kan. 725, 352 P.2d 1056; B. W. & Leo Harris Co. v. City of Hastings, 240 Minn. 44, 59 N.W.2d 813 (1953); Hartley v. Williams, 287 S.W.2d 129 (Mo.App. 1956); Grand Lodge of Ancient Order of United Workmen of North Dakota v. Fischer, 70 S.D. 562, 21 N.W.2d 213, 161 A.L.R. 1466 (1945).

See Hughes v. Fairfield Lbr. & Supply Co., 143 Conn. 427, 123 A.2d 195 (1956); Hartley v. Williams, 287 S.W.2d 129 (Mo.App. 1956); Johnson, Title Examination in Massachusetts, in Casner & Leach, Cases and Text on Property 886 (1951); Payne, The Future of Uniform Title Standards, A.B.A. Proc., Section of Real Prop., Prob. and Trust Law 4 (1953). That the custom of conveyancers has been a recognized source of the common law, see 7 Holdsworth, History of English Law 384 (1922).

IV. OKLAHOMA TITLE EXAMINATION STANDARDS

To introduce you to the Oklahoma Title Examination Standards, attached, after Exhibit A, which is the List of States with Standards, and Exhibit B, the Selected List of Articles on Oil and Gas matters by Kraettli Q. Epperson, are the following:

1. Table of Contents for the Oklahoma Title Examination Standards (Exhibit C)
2. Selected Standards (Exhibit D)
3. Current Agenda for the Oklahoma TES Committee (Exhibit E)